83-1219

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

THE MACON TELEGRAPH PUBLISHING COMPANY
Petitioner,

v.

BETTY H. ELLIOTT
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

I. WHETHER *NEW YORK TIMES V. SULLIVAN* PROHIBITS RECOVERY FOR A PUBLICATION WHICH IS NOT DEFAMATORY.

II. WHETHER THE DAMAGES AWARDED BY THE JURY ARE CLEARLY EXCESSIVE AND THEREFORE UNCONSTITUTIONAL UNDER THE DECISIONS OF THIS COURT.

III. WHETHER THE EVIDENCE FAILS TO SUPPORT WITH CONVINCING CLARITY THE FINDING OF ACTUAL MALICE NECESSARY TO SUSTAIN THE AWARD OF PUNITIVE DAMAGES.

IV. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY INSTRUCTING THE JURY ON WHAT CONSTITUTES ACTUAL MALICE.

V. WHETHER THE AWARD OF PUNITIVE DAMAGES AGAINST A PUBLISHER MUST BE REVERSED WHERE THERE HAS BEEN NO EVIDENCE THAT THE PUBLISHER POSSESSED A HIGH DEGREE OF AWARENESS OF PROBABLE FALSITY OF THE PUBLICATION.

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* Pursuant to Supreme Court Rule 21.1(b) and 28.1 the following were parties to the proceeding below.

Betty H. Elliot
The Macon Telegraph Publishing Co.
Knight-Ridder Newspapers, Inc., parent
Company of The Macon Telegraph Publishing Co.

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OPINIONS BELOW

The following are reproduced in their entirety in the appendix:

The Opinion of the Court of Appeals of the State of Georgia dated February 8, 1983, (app. B) and the amended Opinion dated March 10, 1983 (app. D).

The Order of the Supreme court of Georgia vacating the writ of certiorari dated October 4, 1983 (app. E).

The Order of the Supreme Court of Georgia dated October 25, 1983 denying Petitioner's motion for rehearing (app. F).

JURISDICTIONAL STATEMENT

This libel case was tried in the State Court of Bibb County Georgia. A jury awarded the Plaintiff $50,000 in compensatory damages and $150,000 in punitive damages.

Petitioner appealed the judgment to the Court of Appeals of the State of Georgia. The judgment was affirmed by said Court by an opinion dated February 8, 1983. The Court amended its opinion on March 10, 1983.

The Supreme Court of Georgia granted the newspaper's Petition for Certiorari on May 26, 1983. The Georgia Supreme Court vacated the writ of certiorari on December 4, 1983. Petitioner's motion for reconsideration was denied on October 25, 1983.

Jurisdiction over this matter is conferred upon this Court by 28 U.S.C. §1257(3) 1976.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . ."

The Fourteenth Amendment of the United States Constitution provides, in part:

> No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a libel action brought by a private individual concerning a newspaper article that was published at the conclusion of a highly-publicized murder trial by Petitioner, The Macon Telegraph Publishing Company ("the newspaper"). The article was an account of interviews conducted with several jurors after the trial. One of the jurors mentioned in the article, Respondent Mrs. Betty H. Elliott, sued for libel in the State Court of Bibb County, Georgia, claiming that statements attributed to her in the article were not made by her and that they were false, malicious, and defamatory. The case was submitted to a jury which returned a verdict in favor of Mrs. Elliott for $50,000 in actual damages and $150,000 in punitive damages. The newspaper unsuccessfully pursued all possible avenues of review in the state courts of Georgia and now petitions this Court for a Writ of Certiorari to the Supreme Court of Georgia. The controversy to be presented to this Court is whether the actions of the Georgia courts violated the First Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment.

While there is a factual dispute with respect to the truth or falsity of the allegedly libelous material, the facts essential to a resolution of the questions presented to this Court are not in dispute. They were the subject of a stipulation between the parties in the Georgia trial court and they can be briefly summarized.

Michael Wallace Lumpkin was placed on trial in November of 1980 by the state of Georgia for the murders of Michael and Becky Lubel. The trial began on Monday, November 10, 1980, and ended on Friday, November 21, 1980. On November 25, 1980, an article entitled "Juror: Lumpkin Acted Like Innocent Man" appeared in The Macon Telegraph. The article contained the following account:

> Two other members of the jury that acquitted Lumpkin of murder Friday disclosed in post-trial inter-

> views that they had already made up their minds before the panel met collectively to discuss the case.
>
> . . .
>
> Betty Elliott, a bus driver for the Bibb County Board of Education, and Louie A. Bridges, a Robins Air Force Base employee, said they decided to vote not guilty before deliberations began.
>
> . . .
>
> Although they couldn't be specific, it was some time within a day or two before the case went to the jury when they formed an opinion.

A day or two before the twelve day trial ended would have been a time long after the prosecution had rested its case and prior to completion of defendant's case.

On December 16, 1980, Mrs. Elliott wrote a letter to The Macon Telegraph Publishing Company stating that she had not made the statement that she decided to vote not guilty before deliberations began in the Lumpkin case and asking for a printed retraction. On February 4, 1981, Mrs. Elliott wrote a second letter to The Macon Telegraph Publishing Company. This letter included the text of Mrs. Elliott's earlier letter demanding a retraction.

The newspaper declined Mrs. Elliott's request for a retraction but published the text of Mrs. Elliott's December 16, 1980 letter on the editorial page of the newspaper, and added the statement of the Editor, "We stand by the story, but we are happy to publish Ms. Elliott's side of the matter. —ED."

On February 17, 1981, The Macon Telegraph Publishing Company was served with a Complaint alleging that the portions of the November 25, 1980 article quoted above were not made by Mrs. Elliott, were false, malicious, and defamatory. Mrs. Elliott demanded $50,000 compensatory damages and $250,000 punitive damages. The jury awarded her $50,000 compensatory damages and $150,000 punitive damages on

March 2, 1982. The trial court entered a judgment on the jury verdict on March 2, 1982.

In its brief to the Court of Appeals of Georgia, the newspaper argued that the words in the article do not constitute newspaper libel as a matter of law; that the newspaper was not liable for punitive damages because no constitutional malice had been shown at trial; and that the newspaper was entitled to a new trial on every ground set out in its amended motion for new trial.

The Court of Appeals of Georgia rejected the newspaper's argument that the words of the article were not defamatory as a matter of law. In addition, without reference to *Gertz v. Welch*, 418 U.S. 323 (1974), or to any other decision of this Court, the court rejected the newspaper's contention that it is not liable for punitive damages because actual malice had not been proven. The court held that the newspaper's "arguments based on constitutional law requiring separate evidence of a defendant's 'actual malice' before a defamation can be found applies [sic] to defamations against public officials and public figures and are inapposite in this case as there is no evidence that appellee [Mrs. Elliott] was a public figure or a public official." Moreover, the court found that the evidence was sufficient to authorize the jury to find the existence of a false and malicious defamation. The court refused to overturn the awards of actual and punitive damages as excessive.

In response to the February 8, 1983 ruling of the Court of Appeals, the newspaper filed a Motion for Rehearing. On March 10, 1983, the Court of Appeals denied the newspaper's Motion for Rehearing and issued a partial revision of its original opinion. Finally recognizing this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court of Appeals held in the revised portion of its opinion that the trial court did not err in denying the newspaper's Motion for a Directed Verdict and Judgment Notwithstanding the Verdict on the issue of the Newspaper's liability for punitive damages. The court held that from its "review of the evidence and the

trial court's charge on this issue, we find that the jury could reasonably conclude that the reporter, and thus appellant [the newspaper], was aware that the statements attributed to appellee [Mrs. Elliott] were false when they were published and established actual malice." The court held further that "the rule in Georgia in libel is that the malicious conduct of an employee is imputed to the employer provided it is within the scope of his authority." In a section added to its original opinion, the court held that the trial court had not erred in denying the newspaper's Motion for New Trial made on the general grounds that there was no evidence that it libeled Mrs. Elliott or that Mrs. Elliott was entitled to punitive damages.

On May 26, 1983, the Supreme Court of Georgia granted the newspaper's Writ of Certiorari. Two justices dissented and one justice was disqualified. The Court notified the newspaper that it was particularly concerned with the question of whether the article was defamatory as a matter of law.

On August 29, 1983, the Supreme Court of Georgia issued an order noting that because Justice Hardy Gregory, Jr. was disqualified to act in the case, it was ordered that the Honorable Jere F. White, Judge of the Superior Court of the Cherokee Judicial Circuit, be designated to act in the place of Justice Gregory in the case.

On October 4, 1983, the Supreme Court of Georgia, by a vote of 4 to 3, held "[a]fter plenary consideration of this matter, it is found not to satisfy the criteria for the grant of certiorari and the writ is therefore vacated."

On October 12, 1983, the newspaper served its Motion for Rehearing on Behalf of Applicant for Certiorari and that motion was received in the Supreme Court of Georgia on October 17, 1983.

On October 25, 1983, the Supreme Court of Georgia in a 4 to 3 vote denied the newspaper's Motion for Rehearing. Superior Court Judge White, taking the place of Justice Gregory who was disqualified, voted with the majority.

On December 21, 1983, petitioner filed with the Court of Appeals of the State of Georgia a motion to stay the remittitur. The motion was summarily denied the same day.

On December 23, 1983, the Petitioner filed with this Court a Motion to stay the Remittitur (Mandate) of the Court below. Said Motion was denied by Mr. Justice Powell on December 27, 1983.

INTRODUCTION:

Reasons For Granting The Writ

This case resulted in a judgment in the amount of $200,000 on the basis of a newspaper article that was not defamatory, caused virtually no damage to the Respondent's reputation, and which was published with an absolute good faith belief in its accuracy.

1. The Article is not defamatory as a matter of law. It merely states that during the course of a criminal trial, a juror formed the opinion that the defendant was innocent. This occurred after the prosecution had rested, but before the defense had completed its case. It is perfectly appropriate for a juror to conclude that the state has failed to prove guilt beyond a reasonable doubt at the close of the prosecution's case. There is no possible interpretation of the article which could cause the Respondent to be held up to hatred, ridicule, or contempt, or cause her to be shunned. The statement is not defamatory and caused no damage to reputation. To allow the Respondent to recover $200,000 for a totally innocent statement does violence to Petitioner's First Amendment rights and is contrary to this Court's pronouncements in *New York Times v. Sullivan* 376 U.S. 254, (1964) and *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974). The First Amendment prohibits liability without fault and requires proof of actual damages. In addition, the First Amendment prohibits recovery for innocent, non-defamatory statements.

2. The article caused no damage to Respondent's reputation. The judgment below is a classic example of a jury

awarding a grossly excessive verdict in the absence of proof of actual damage. The only evidence of actual damage is the temporary loss of a baby sitting job. Yet the jury awarded $50,000 in compensatory damages. This case presents precisely the type of abuse which this Court sought to prevent in *Gertz*.

3. The punitive award of $150,000 is similarly unconscionable and constitutionally infirm. When jurors, who are generally unskilled in punishment and susceptible to emotional responses, impose disproportionate awards of punitive damages, the system becomes a mockery and the First Amendment is imperiled. Huge jury awards of punitive damages have become a problem having national impact.[1] A reversal of the punitive award in this case would do much to diminish the climate of self-censorship which is the inevitable result of massive awards of punitive damages.

4. The article was published with an aboslute good faith belief in its truth and accuracy. The author of the article took contemporaneous notes of his interview with the Respondent which verify the accuracy of the statement. Moreover, there is no competent evidence that the publisher entertained any doubts as to the truth of the publication.

The article in question is a report of a criminal proceeding based on consentual interviews with discharged jurors. Public discussion of the jury process, like open *voir dire* proceedings "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press Enterprise Co.* v. *Superior Court.* ____ U.S. ____, (decided Jan. 18, 1984) slip opinion at 6. The article constitutes a sensitive discussion of the thoughts and emotions experienced by the jurors during the course of a murder trial. To suggest that it is an attack upon Ms. Elliot's character or reputation is absurd. The article is emphatically *not* the type of " 'calculated falsehood' or 'reckless attack' upon the character

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[1] F. Friendly, *Is Our Libel Law a Threat to Free Speech*, Washington Post, Jan. 15, 1984 at D1-2, Col. 1.

of another which is 'at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.' " *Curtis Publishing Company v. Butts,* 388 U.S. 130 (1967).

I. THE FIRST AMENDMENT PROHIBITS RECOVERY FOR A STATEMENT WHICH IS NOT DEFAMATORY

In New York Times v. *Sullivan,* this court established that the *constitution* requires a libel plaintiff to prove all common law elements of a cause of action for libel in addition to establishing actual malice. This court explicitly held that the First Amendment was violated because the article was not "of and concerning" the respondent.

> We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself.

Id., at 289.

The most fundamental common law element of a cause of action for libel requires that the statement must be defamatory. The article in this case did not defame the Respondent. It simply stated that she had formed an opinion as to the innocence of the defendant "a day or two" before the conclusion of a twelve day trial.

Defamation is defined as "the uncontested and unprivileged communication to a third party of a false idea which tends to injure plaintiff's reputation by lowering the community's estimation of him, or by causing him to be shunned or avoided, or by exposing him to hatred, contempt or ridicule." 1 Hanson, *Libel and Related Torts,* §167 (1969). It is undisputed

that a communication that is merely unflattering, annoying, irking, or embarassing, or that simply hurts the plaintiff's feelings is not actionable. R. Sack, *Libel, Slander and Related Problems* § II.4.1. (1980). One court has described the source of reputational injury as nothing less than "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons and to deprive one of their confidence and friendly intercourse in society." *Kimmerle v New York Evening Journal, Inc.*, 262 N. Y. 99, 102, 186 N.E. 217, 218 (1933).[2]

The article at issue in the present case contained absolutely no references which even remotely approached the level of an actionable defamation under these traditional and universally accepted definitions.

The prosecution bears the burden of proof that a criminal defendant is guilty beyond a reasonable doubt. To state that a juror formed an opinion as to the innocence of the accused at a time during a criminal trial when the prosecution had concluded its case against the accused does not charge the juror with any improper, illegal, dishonest or immoral conduct. A juror has the right to have an opinion at that point in the case as to the innocence of the accused if the prosecution has not carried its burden of proof. These words do not charge that the juror has prejudged the case before she was sworn as a juror in the case, that she violated her oath, that she wantonly and willfully made a verdict unsupported by either the evidence or the law, or that she gave false answers on the voir dire question.

It is legal and proper for a juror in a criminal case to form an opinion that there has not been sufficient evidence to prove the defendant guilty beyond a reasonable doubt after the prosecution has rested. This is all that was said about the

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[2] RESTATEMENT (SECOND) OF TORTS ¶ 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

Respondent. Jurors have the right to form and change opinions from time to time during a trial. The Petitoner has said nothing about the Respondent in this case which imputes crime, fraud, or other reprehensible conduct and the statements do not exclude the possiblity that the Respondent acted in good faith. A juror acting in good faith could form an opinion a day or two before the case went to the jury, continue to listen to the remainder of the case including the charge of the court, and then, under the foregoing authority, decide to vote not guilty before the jury meets to deliberate. The article in question, therefore, caused no injury whatsoever to the Respondent's reputation. She was not defamed in any manner.

As stated by this Court: "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341. Where, as in the instant case, there has been no injury to reputation and thus no defamation, there should likewise be no recovery. Since no state interest is being served, it would violate First Amendment freedoms to allow the judgment in this case to stand.

II. THE DAMAGES AWARDED BY THE JURY ARE CLEARLY EXCESSIVE AND ARE UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT AND THE DECISIONS OF THIS COURT.

The jury in this defamation action returned a verdict in favor of the Respondent in the amount of $50,000 actual damages and $150,000 punitive damages. A review of the meager evidentiary record on which the damages are based reveals the excessiveness of the award. The record shows that Respondent suffered virtually no actual or special damages as a result of the alleged libel; she suffered at most a nominal monetary loss and she incurred no medical or other expenses. Nevertheless, the jury returned an award which included actual damages for the total amount prayed for in the complaint and

grossly excessive punitive damages. This utterly unsupported verdict can only be the product of passion, prejudice or sympathy, *Moore v. Greene,* 431 F.2d 584 (9th Cir. 1970); *Widener v. Pacific Gas & Electric Co.,* 75 Cal. App. 3d 415, 142 Cal. Rptr. 304 (1977), *cert. denied,* 436 U.S. 918 (1978), and is of a magnitude which is shocking to the conscience of the court. *Casale v. Dooner Laboratories, Inc.,* 343 F. Supp. 917 (D.Md. 1972), *aff'd in part, rev'd in part on other grounds,* 503 F.2d 303 (4th Cir. 1973); *Fleck Bros. Co. v. Sullivan,* 423 F.2d 155 (7th Cir. 1970).

A. *The Punitive Damages Award Violates Petitioner's Rights Under the First Amendment.*

The rule endorsed by at least five members of the Court in *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971), is that " . . . [i]n all actions for libel or slander . . . awards of punitive damages will be strictly limited." *Id.* at 58-59 (White, J., concurring). Three years later, in *Gertz v Robert Welch, Inc.,* 418 U.S. 323 (1974), Justice Powell's opinion for the majority expressed concern over the unbridled discretion of juries to award punitive damages. Justice Powell observed that:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.

The Court concluded that punitive damages cannot be awarded to a private plaintiff unless he meets the "demanding showing" required by *New York Times* because "[l]ike the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self censorship . . . . " *Id.* at 350.

It has been emphasized by federal courts, state courts and scholarly commentators that a jury's discretion to award puni-

tive damages in libel actions can be a very direct and substantial deterrent upon the exercise of First Amendment press freedoms.[3]

In this regard, it is well-established that since the free exercise of First Amendment freedoms are at stake, any punitive award may be upheld only if it effectuates a "subordinating [state] interest which is compelling." *Bates v. Little Rock*, 361 U.S. 516, 524 (1960). The award of punitive damages must be shown to be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). Furthermore, the award of punitive damages must effectuate the compelling state interest by the least restrictive means available. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-65 (1976); *Coates v. Cincinnati*, 402 U.S. 611 (1971).

Courts in many jurisdictions therefore have held that an award of punitive damages must bear a "reasonable relationship" to the actual damages assessed. The authorities recognize no fixed ratio by which to determine the proper proportion between actual and punitive damages. *See* Annot., 35 A.L.R. 2d 218, 255 (1954); 1 Hanson, *Libel and Related Torts*, § 167 (1969). One court overturned a punitive damages award solely on the ground that there was a substantial award for compensatory damages. In *McHale v. Lake Charles American Press*, 390 So.2d 556 (La. 1980), *cert. denied*, 452 U.S. 941 (1981), the court expressed its concern for the effect of punitive damages awards on First Amendment rights and held that such an award in addition to compensatory damages was in-

[3] See *Gertz v. Robert Welch, Inc.*, 418 U.S. at 346, 349-350; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 58-65 (White, J., concurring), 74-75 (Harlan, J., dissenting), 78-87 (Marshall and Stewart, JJ., dissenting) (1971); *Buckley v. Littell*, 539 F.2d 882, 897 (2nd Cir. 1976) *cert. denied*. 429 U.S. 1062; *Afro-American Publishing Co. v. Essex County Newspapers, Inc.*, 330 N.E. 2d 161 (Mass. 1975): *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 545 P.2d 81 (1975); *Farrar v. Tribune Pub. Co*, 57 Wash. 549, 358 P.2d 792 (1961); Restatement (Second) of Torts, Explanatory Notes § 621, Comments b and f, at 286, 288 (Tentative Draft, Nov. 20, 1974); and *Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech*, 64 Yale L.J. 610, 613 (1955).

appropriate in libel cases. The court supported its holding in *McHale* with the following language from *Sprous v. Clay Communications, Inc.*, 211 S.E.2d 674 (W.Va. 1975):

> It would appear that the penumbra of protection of the First Amendment is such that punitive damages may only be recovered in cases where the award of actual damages is insufficient to dissuade others in like circumstances from committing similar acts in the future. The policy embodied in the First Amendment of encouraging broad dissemination of public information forecloses an award of punitive damages which jeopardizes the existence of a newspaper when such damages are unnecessary to protect the public from similar conduct in the future or to make possible the vindication of plaintiff's rights in the absence of demonstrable actual damages. An award of $750,000 would have a chilling effect upon the legitimate exercise of First Amendment rights and would lead to the type of self-censorship which has been the object and purpose of the United States Supreme Court to prevent since *New York Times v. Sullivan.*

Id. at 584.

When considered in light of the foregoing standards of review, the award to Respondents of $150,000 in punitive damages clearly constitutes an unwarranted impairment of press freedom. The state interest in redressing reputational injury simply does not warrant a punitive damages award of this magnitude which will certainly result in self-censorship.

B. *The Award of Compensatory Damages Made by the Jury Below Is Not Supported by Competent Evidence and is Excessive.*

Inasmuch as the award of compensatory as well as punitive damages in libel actions may work a restraint upon the exercise of First Amendment freedoms, Petitioner urges this Court to

make an independent examination of the record as a whole to insure that no First Amendment freedoms have been infringed by the judgment. *New York Times v. Sullivan,* 376 U.S. 254, 285 (1964). *See also Edwards v. South Carolina,* 372 U.S. 229, 235 (1963); *Blackburn v. Alabama,* 361 U.S. 199, 205, n.5 (1960). It is clear that the paucity of evidence adduced at trial on Respondent's damages cannot support an award of $50,000 in actual damages. The court below, therefore, erred in failing to vacate the verdict and order a new trial. *See Burns v. McGraw-Hill Broadcasting Co.,* 659 P.2d 1351 (1983); *Widener v. Pacific Gas & Electric Co.,* 75 Cal. App. 3d 415, 142 Cal. Rptr. 304 (1977), *cert. denied,* 436 U.S. 918 (1978).

The only testimony regarding the effect on the Respondent from the publication came from the testimony of three witnesses, Mary Ann Goss, Tommy Burkhalter and Mary Rose Bush. Mrs. Goss testified as follows:

> All right. Having known Mrs. Elliott and known her as I did, well, it completely changed my mind about her, and I said this is—this is really stupid, that I don't believe I'd want her on my jury if she made up her mind before a case was over, before everything was heard . . . she wouldn't be what I would select.

Tommy Burkhalter testified as follows:

> Well, I didn't believe Mrs. Elliott could do such a thing and I didn't feel—I didn't think Mrs. Elliott was such a person that I thought she was before I read the article . . . I just didn't think Mrs. Elliott, would, you know, could do such a thing, and I just—let me think how to put it—I just didn't think as highly of Mrs. Elliott after I read the article.

Mary Rose Bush testified as to her feelings following the article as follows:

> I don't know how to describe it. Well, we had been letting her keep our little baby so we—I guess were wondering you know, about him, you know, too, and

> I guess what kind of person she was, you know, with her keeping the baby and all, you know. If—like it said in one article, you know, like she had forgotten, you know, I guess which car she went in or whatever when she went shopping, you know, that she might forget, you know, when, you know, giving medicine, if she had already had it, or something. . . . Well, we, you know, sort of thought, you know,—you know, sort of figured, you know, she was a responsible, you know, type person, you know. . . . We had, you know,—didn't go over there for I imagine six to seven weeks, you know, after that. . . . we just—after reading the article and all we didn't, you know, leave the baby with her and we got another lady to keep him when we, you know, go out that lives, you know, out near us, you know . . . through that time we had gotten, you know, the other lady, you know, to—the other lady to keep him. [Did you have an occasion to go to see Mrs. Eliott before say, January?] It was sometime in January, I guess, before we—before I saw her, you know, I saw her at the Piggly-Wiggly, and we had talked and she had, you know, explained to me about the article and so—[Well, why didn't you go (to see Mrs. Elliott)?] I guess it was because we wasn't clear, you know, too about, you know, the article, you know—you know, about her. It was about, you know, a person shouldn't make up their mind and I don't know exactly what—I know that we—I guess it was mostly—it was due to the article because we didn't, you know, go, you know, over there.

The foregoing testimony was the only evidence presented to the jury which could have constituted a basis for the award of $50,000 in actual damages to the Respondent—the total amount prayed for in the complaint. The only actual pecuniary loss was the temporary loss of a babysitting job. Respondents employment as a bus driver was unaffected.

There is no question that substantial latitude is given to a jury in awarding damages. The array of factors which may be

considered includes anything from the seriousness of the alleged defamation or the plaintiff's prominence and professional reputation, to the extent of the distribution of the statement or the extent to which it was actually believed. Damages may be awarded to compensate for loss of reputation, shame, mortification, humiliation, loss of standing in the community, mental anguish and suffering. R. Sack, *Libel, Slander, and Related Problems* § III.4.1 (1980). This broad discretionary power of the jury notwithstanding, there is a complete lack of evidence in the record of damages in the present case to support or justify the amount of the judgment rendered by the jury.[4] At most nominal damages were appropriate. The award of $50,000 compensatory damages for nothing more than the loss of one part-time babysitting job is disproportionate [5] and clearly excessive.[6] It must be concluded that the jury award was not based upon sober judgment but rather upon passion, prejudice or sympathy not related to the law or facts of the case. *Moore*, 431 F.2d at 584; *Widener*, 142 Cal. Rptr. at 304.

C. *Numerous Federal and State Courts Have Reduced Excessive Compensatory and Punitive Damage Awards Not Supported by the Evidence on First Amendment Grounds.*

Numerous courts in this country have held the First Amendment to require that both compensatory and punitive damages must be supported by competent evidence in libel cases. As shown above, the record in this case clearly reveals an utter lack of any such evidence. The overwhelming weight of authority therefore mandates that the unprecedented awards of

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[4] *Ag-Chem Equipment Co., Inc. v. Hahn, Inc.*, 480 F.2d 482 (8th Cir. 1973); *Wegner v. Rodeo Cowboys Association*, 417 F.2d 881 (10th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970); *Empire Printing Co. v. Roden*, 247 F.2d 8 (9th Cir. 1957); *Belo Corp. v. Rayzor*, 620 S.W. 2d 756 (Tex App. 1981).

[5] *Atkinson v. Equitable Life Assurance Society*, 519 F.2d 1112 (5th Cir. 1975).

[6] *Hope v. Hearst Consolidated Publications, Inc.*, 294 F.2d 681 (2d Cir. 1961), *cert. denied*, 368 U.S. 456 (1962), 95 A.L.R 2d 213; *Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc.*, 286 F.Supp 899 (W.D.Pa. 1968), *rev'd on other grounds*, 438 F.2d 433 (3d Cir. 1971), *cert. denied*, 404 U.S. 898 (1971).

compensatory and punitive damages in this case should not be permitted to stand.

A number of federal and state courts have either reduced compensatory and punitive damage awards on appeal or have reversed the decision itself because the awards were excessive. E.g., *Crowell-Collier Publishing Co. v. Caldwell,* 170 F.2d 941 (5th Cir. 1948) (compensatory and punitive damage awards totalling $237,500 "excessive"); *Airlie Foundation, Inc. v. Evening Star Newspaper Co.,* 337 F. Supp. 421 (D.D.C. 1972) (compensatory damages awarded to foundation of $419,800 and to its founder of $100,000 reduced to $50,000 and $10,000, respectively, by remittitur). See also, *Butts v. Curtis Publishing Co.,* 225 F. Supp. 916 (N.D.Ga. 1964) (punitive damages of $3 million reduced to $400,000 by remittitur), *aff'd on other grounds,* 351 F.2d 702 (5th Cir. 1965), *aff'd,* 338 U.S. 130 (1967); *Burnett v. National Enquirer,* 9 Med. L. Rptr 1921 (Cal. Ct. App.2d 1983) ("excessive" punitive damage award of $750,000 reduced to $150,000 on remittitur) *appeal docketed,* No. ____ (U.S. Dec. 30, 1983); *Kidder v. Anderson,* 345 So. 2d 922 (La. App. 1st Cir. 1977) ("excessive" compensatory damage award of $500,000 reduced to $100,000 on remittitur), *rev'd on other grounds,* 3 Med. L. Rptr 1881 (La. 1978), *cert. denied,* 439 U.S. 829 (1978); *Widener v. Pacific Gas & Electric Co.,* 75 Cal. App. 3d 415, 142 Cal. Rptr. 415 (1977) (affirming order of new trial where jury award of $750,000 in compensatory and $7 million in punitive damages "excessive"), *cert. denied,* 436 U.S. 918 (1978).

III. THE EVIDENCE FAILS TO SUPPORT WITH CONVINCING CLARITY THE FINDINGS OF ACTUAL MALICE NECESSARY TO SUSTAIN THE AWARD OF PUNITIVE DAMAGES

It is a fundamental principle of libel that state courts are precluded from submitting to juries the issue of punitive damages unless there has been clear and convincing trial proof in support of the existence of constitutional actual malice, that is, publication with knowledge of falsity or reckless disregard

for the truth. This well-established principle was first articulated by this Court in 1974 in *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974). In *Gertz* this Court held:

> We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation... Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions... In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

Id. at 350.

It is well established that in libel cases an appellate tribunal has a duty to "make an independent examination of the whole record" in order to assure "that the judgment does not constitute a forbidden intrusion on the field of free expression." *Greenbelt Cooperative Publishing Ass'n. v. Bresler,* 398 U.S. 6, 11 (1970); *New York Times v. Sullivan,* 376 U.S. 254, 285 (1964). A review of the record as a whole clearly demonstrates that the subject article was published without actual malice and the award of punitive damages is constitutionally prohibited.

New York Times v. Sullivan first defined the constitutional protections to be afforded a publisher through the application of the term "actual malice". This Court has sought to add substance to the definition of actual malice in subsequent cases. In *Garrison v. Louisiana,* 376 U.S. 64 (1964), this Court held that actual malice in the form of reckless disregard for the truth requires a "high degree of awareness ... of probable falsity." *Id.* at 74. This Court has made it absolutely clear that a finding of actual malice must be supported by evidence which focuses on the defendant's subjective state of mind at the time of

publication. *Herbert v. Lando,* 441 U.S. 153, 160 (1979). Perhaps the strongest and most articulate judicial statement on actual malice as it relates to the defendant's state of mind was set forth by this Court in *St. Amant v. Thompson,* 390 U.S. 727 (1968):

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra,* the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison v. Louisiana,* 379 U.S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity." 379 U.S. at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 153, (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id. at 731.

It is undisputed that a mistake in interpreting events or documents does not evidence the necessary state of mind. *Time, Inc. v. Pape,* 401 U.S. 279 (1971). Such evidence does not indicate a publisher's lack of belief in the truth of his statements. Defendants have been held to be free of actual malice despite a general failure to investigate. *Id.* at 291-92. Failure to talk to the plaintiff before publication,[7] failure to verify information,[8] and publication of material incapable of verification[9] have been judicially determined not to constitute actual malice.

It is readily apparent from the stipulated facts and the undisputed record below that the Petitioner's conduct does not rise to the level of blatantly reckless or knowingly false publication required under the decisions of this Court. In the decision below, the Court of Appeals held that the actual malice requisite for a finding of punitive damages was present by virtue of Respondent's testimony that the article was false. App. at 5d. The evidence at trial was uncontradicted that Petitioner's reporter, Alan Sverdlik, extensively interviewed the Respondent, that he contemporaneously made notes of the interview, and that he based the article upon these notes.

Not only did the reporter's notes which were admitted into evidence establish that, subjectively, he understood the respondent to make the statements upon which he based his article, but his uncontradicted testimony evidenced a continuing commitment to the belief that the article was accurate:

> I asked her when she filed into the jury room had she pretty much known her opinion on the guilt or innocence of the defendant, and she said she had, and that she considered him not guilty. So I said,

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[7] *Hurley v. Northwest Publications, Inc.,* 273 F. Supp. 967 (D. Minn. 1967), *aff'd,* 398 F.2d 346 (8th Cir. 1968); *Malerba v. Newsday, Inc.,* 64 A.D.2d 623, 406 N.Y.S.2d 552 (N.Y. App. Div. 1978).

[8] *Samborsky v. Hearst Corp.,* Civ. No. HM 76-375 (D. Md. Feb. 1, 1977); *Fadell v. Minneapolis Star & Tribune Co., Inc.,* 425 F. Supp. 1075 (N. D. Ind. 1976) *aff'd* 557 F.2d 107(7th Cir. 1977), *cert. denied* 434 U.S. 966 (1977).

[9] *Hotchner v. Castillo-Puche,* 551 F.2d 910 (2d Cir. 1977) *cert. denied sub. nom., Hotchner v. Doubleday & Co.,* 434 U.S. 834 (1977).

> "You knew how you would vote pretty much when you went into the jury room?" And she said, "Yes." I asked her if she could pinpoint a time in this very complicated long two week trial in which that opinion was formed. She said she couldn't really say specifically. I asked her, "Would it be fair and correct to say that you came to this conclusion within a day or two of the deliberations?" And she said, "Yes."

Moreover, Sverdlik also testified that he spoke with Respondent over the phone on a Monday evening between 6 and 7 p.m., and that he composed Respondent's comments which he had written into the article at around 8:15 p.m. that same evening.

The evidence established that Sverdlik wrote his article based upon a good faith belief that it was a true and accurate product of a thorough and detailed interview with the Respondent. The article complained of by Respondent was not an exposé of juror wrongdoing nor was it dramatic in its presentation of the events which transpired during the process of juror decisionmaking. Instead it was a measured report of jurors' impressions based upon extensive interviews. It is inconceivable under these circumstances that Sverdlik would have the motivation to publish a knowingly false statement; particularly since he already possessed similar statements from other jurors.

It is respectfully submitted that the evidence was insufficient to clearly and convincingly establish the subjective actual malice, in the mind of either reporter Sverdlik or in his corporate publisher, which is required to sustain a verdict for punitive damages.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY INSTRUCTING THE JURY ON WHAT CONSTITUTES ACTUAL MALICE

As noted above, it is axiomatic that in a libel suit there must first be a finding that the publication was made with actual malice prior to a finding by a libel jury that punitive damages are warranted. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Additionally, the jury must find by clear and

convincing evidence that the publisher possessed a "high degree of awareness of . . . probable falsity" of the article when the publication occurred. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). The cases by this Court and many federal and state courts make it "clear that reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Thus the inquiry for the jury is whether the publisher, its agents and employees *subjectively* "entertained serious doubts as to the truth of his publication." *Id.* at 731. It is then encumbent on the trial court to insure through proper jury instructions that the jury will focus on the state of mind of a defendant, its agents and employees at the time of publication. In this case the trial court erred in refusing to give two of defendant's jury instructions on actual malice. As a result, Respondent sought and received punitive damages in the amount of $150,000. The sole instruction proferred by the court below on actual malice was the following:

> And if you determine that she is entitled to recover punitive damages, then I charge you that you must find first that there was actual malice on the part of this defendant, and that is that the defendant had published the article with knowledge of the falsity of the statements or a reckless disregard of whether they were false or true.

This bare bones instruction on actual malice in light of subsequent developments of that notion by this Court was totally inadequate and misleading in at least one major respect. This instruction clearly constitutes reversible error in that the defendant was not granted the full measure of constitutional protection established by this Court in *Gertz v. Robert Welch, Inc.* and other cases subsequent to *New York Times v. Sullivan.* Given the apparent limitations of the trial court's actual malice charge, the likelihood of confusion or error on the part of the jury is extreme. No explanation of the phrase "knowledge of falsity of statements or a reckless disregard of whether they were false or true" appears anywhere in the charges to the jury. As a result the jury and ultimately the Petitioner were denied

the benefits of this Court's meticulous development of the term "actual malice" since it was adopted by this Court in *New York Times v. Sullivan.*

Moreover, the structure of the instruction itself is an invitation to the jury to award punitive damages without a requisite finding of actual malice. The instruction begins with the phrase *"if you determine that she is entitled to recover punitive damages then I charge that you must first find that there was actual malice. . ."* The Court in its erroneous statement of the rule has put the cart before the horse. A jury may not award punitive damages *unless* there has been a prior showing of actual malice. Logic requires that the rule be stated: "If you determine that there was actual malice . . . then she is entitled to recover punitive damages." The instruction is erroneous, confusing and contributed to the jury awarding punitive damages in the absence of actual malice.

It is noteworthy that Petitioner offered two jury charges to the trial court which virtually were verbatim excerpts from this Court's leading cases on the definition of actual malice. Petitioner's Charge No. 13 was a correct statement of the law as contained in this Court's holding in *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964):

> Members of the jury, actual malice has been further defined as the use of a calculated falsehood which has been knowingly and deliberately published with a high degree of awareness of its probable falseness. The Plaintiff must produce sufficient evidence to permit you to come to the conclusion that the Defendant in fact entertained serious doubts as to the truth of the publication.

Petitioner's Charge No. 18 was a correct statement of the law as contained in *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968):

> Members of the jury, in deciding if the Defendant newspaper is guilty of actual malice, Defendant's conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing, but there must be

> sufficient evidence to permit the conclusion that the Defendant newspaper entertained serious doubts as to the truth of its publication.

The refusal of the trial court to instruct the jury with the very cases which give meaning to the term "actual malice" is clearly erroneous. The explanation by Justice White in *St. Amant v. Thompson* of the term "actual malice" has become the standard for jury instructions. It focuses the jury's inquiry on the subjective state of mind of the publisher and assures against a jury mistakenly measuring the publisher's conduct against an objective prudent publisher's standard. Without there being a requirement in Georgia that a trial court fully instruct a jury on the issue of actual malice there is reinstituted the "significant and powerful motives for self-censorship" formerly present in the common law libel action. The "sufficient and adequate breathing space for a vigorous press" therefore, has been unconstitutionally restricted by the courts below. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 354 (Blackman, J., concurring).

V. THE AWARD OF PUNITIVE DAMAGES AGAINST A PUBLISHER MUST BE REVERSED WHERE THERE HAS BEEN NO EVIDENCE WHATEVER THAT THE PUBLISHER POSSESSED A HIGH DEGREE OF AWARENESS OF PROBABLE FALSITY OF THE PUBLICATION.

As noted above, the sole evidence introduced at trial which tended to show actual malice was Respondent's denial that she had uttered the allegedly libelous statements at issue. No evidence whatever was introduced at the trial which tended to show actual malice on the part of the publisher. Sverdlik stated that he had taken notes (later admitted into evidence) at the time of his conversation with Respondent and that these notes formed the basis of his story. More noteworthy, however, the record fails to show that the publisher, The Macon Telegraph Publishing Company, was aware of the likelihood that it was circulating false information. In fact, the record demonstrates that the reporter had recorded in his notes sufficient words to

prove that the article could not have been published with the "high degree of awareness of probable falseness", *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), required to award punitive damages.

Additionally, as The Fourth Circuit noted in *Williams v. City of New York*, 508 F.2d 356 (4th Cir. 1974), quoting Mr. Justice Gray in *Lake Shore Michigan Southern Ry. v. Prentice*, 147 U.S. 101, 107-108 (1893):

> Exemplary or punitive damages being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender, and as warning to others can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by its agent, within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton oppressive or malicious intent on the part of the agent . . . .

Id. at 360-361.

Therefore, "unless the employer is himself guilty of some torious act (or omission) because his employee has misbehaved, an award punishing the employer and deterring him and others situate likewise makes no sense at all." *Id.* at 360.[10] The Restatement of Torts is in accord:

> It is, however, within the general spirit of the rule [allowing for vicarious punitive damage awards against employers] to make liable an employer *who has recklessly employed or retained a servant or employee who is known to be vicious, if the harm resulted from that characteristic.* . . . Nor is it unjust that a person on whose account another has acted should be responsible for an outrageous act for which he otherwise would not be if, *with full knowledge of the act*

[10] See also, Prosser, *Law of Torts*, 32 Tort and Crime (4th Ed. 1971) ("This is particularly true where the employer is a corporation, and the pocket which is hit is that of the blameless stockholders, whom no one wants to punish.")

> *and the way it was done, he ratifies it,* or, in cases in which he would be liable for the act but not subject to punitive damages, he expresses approval of it. (emphasis added).

Restatement (Second) of Torts § 909, *comment* b.

Each of the examples above illustrating the Restatement rule has at its core the fundamental principle not only that it is unfair to punish where there is no notice or knowledge of wrongdoing but that no useful purpose is served by punishing in the absence of such notice or knowledge.

Not only is the efficacy of awarding punitive damages called into question where, as here, the publisher could have no knowledge of the probable falsity of the article. Without a requirement that the publisher itself "in fact entertained serious doubts as to the truth of his publication," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 335 (1974) there is serious impairment of First Amendment rights. Thus, this Court in *New York Times* v. *Sullivan* required that the *same* employee must both publish and know the falsity of the statement in order to cross the constitutional threshold of actual malice. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 287 (1964). Additionally, other Appellate Courts have prohibited damage awards in the absence of a clear and convincing showing that the author's actual malice was shared by his publisher. *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977); *cert. denied sub. nom., Hotchner* v. *Doubleday & Co.*, 434 U.S. 834 (1977); *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966); *Baldine* v. *Sharon Herald Co.*, 391 F.2d 703 (3rd Cir. 1968); *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976); *Nader v. de Toledano*, 408 A.2d 31 (1979), *cert. denied* 444 U.S. 1078 (1979).)

The $150,000 punitive damages award in this case, given the absence of any actual malice on the part of petitioner or its reporter, highlights the inefficacy, fundamental unfairness and unconstitutionality of such an award.

Conclusion

For the foregoing reasons the Petition for Certiorari to the Supreme Court of Georgia should be granted.

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APPENDIX A

Juror: Lumpkin Acted Like Innocent Man

By Alan Sverdlik
Telegraph Staff Writer

A personality trait of Michael Lumpkin that first aroused lawmen's suspicion a year ago convinced at least one juror that Lumpkin could not have committed the Lubel killings, the juror said Monday.

Two other members of the jury that acquitted Lumpkin of murder Friday disclosed in post-trial interviews that they had already made up their minds before the panel met collectively to discuss the case.

Ida Lester, a 62-year-old tailor, said Lumpkin's calm demeanor both sitting at the defense table and on the witness stand made her skeptical that he could have committed two brutal killings.

"TO ME, HE HAD gone through the whole trial like a person who was really, really innocent," said Mrs. Lester. She added that Lumpkin "was just solid" during District Attorney Don Thompson's relentless cross-examination.

The prosecution sought to portray Lumpkin as having no remorse. "Cold, calculating and matter-of-fact" were some of the adjectives that Thompson used, as had investigators with the Bibb County sheriff's when their suspicions heightened in the week following the Lubel slayings last October.

But Mrs. Lester, observing Lumpkin's expression as enlarged color photographs of the bodies were displayed, did not infer guilt. How, she asked herself, could a defendant be "calm as a cucumber" if he had been responsible for the scene depicted in the photographs.

"IT DIDN'T SEEM like anything bothered him," Mrs. Lester said. "He acted like he didn't have a worry in the world."

Mrs. Lester said she trembled when Lumpkin took the stand, thinking he would say something that would give here second thoughts about his innocence. But his testimony did not sway her. "I was more nervous than he was," she conceded.

Betty Elliott, a bus driver for the Bibb County Board of Education, and Louie A. Bridges, a Robins Air Force Base employee, said they decided to vote not guilty before deliberations began.

Although they couldn't be specific, it was sometime within a day or two before the case went to the jury when they formed an opinion.

ASKED ABOUT Lumpkin's testimony, Mrs. Elliott, 51, replied: "Everything he said didn't tally with what the district attorney said. But what the district attorney said didn't tally with what other people said."

The juror said she had frequently gone shopping and forgotten which of her family's two cars she had taken. So it didn't trouble her, she said, that Lumpkin could not keep straight which car he drove to the Lubel's Pineworth Road home on the evening of Oct. 6, 1979.

The testimony of G. Wallace Lumpkin and his wife, which provided an alibi for their son, made both female jurors do some soul searching. The jurors, both mothers, wondered what they would have done had they been Ruth Lumpkin.

"SOMEONE MADE THE statement that anyone would do anything to prevent their son from going to prison," Mrs. Elliott recalled. "Being a mother, I felt (the Lumpkins) would have told the truth."

Without elaborating, Mrs. Lester said: "I wouldn't want to lie for my child but I wouldn't want to see him go to the electric chair either."

On the first vote, nine jurors voted not guilty. On the second, acquittal was unanimous.

The deliberations Friday were not reminiscent of the fierce bickering the jury in the first Lubel murder trial went through in

August. That jury deadlocked after 21 hours. On Friday, Lumpkin walked out of the courtroom a free man after just under five hours.

BRIDGES REMEMBERED the judge instructing the jurors neither to have "a big smile" or "a big frown" on their faces when they settled in the jury box to reveal their verdict.

"Very heartbreaking," Mrs. Elliott said of Mickey Lubel and his family. "They have lost someone very dear."

"My heart goes out to both sides," said Mrs. Lester. "I shed a few little tears when the judge dismissed us. My son was killed on the job in 1975. I am better now but I haven't gotten over it. So I know how the Lubels feel."

APPENDIX B

65201.

THE MACON TELEGRAPH PUBLISHING COMPANY

v.

ELLIOTT

QUILLIAN, Presiding Judge.

This is an appeal from a verdict and judgment for plaintiff-appellee Elliott in an action against defendant-appellant publishing company for libel.

Appellee was a juror in the 12 day retrial of a murder case in which the defendant was acquitted, the first trial having resulted in a mistrial. Three days after the trial concluded, a reporter for appellant spoke to appellee on the telephone and questioned her about the trial. As a result the following appeared in an article about the trial published in appellant's newspaper:

"Two other members of the jury that acquitted Lumpkin of murder Friday disclosed in post-trial interviews that they had already made up their minds before the panel met collectively to discuss the case . . .

"Betty Elliott, a bus driver for the Bibb County Board of Education, and Louie A. Bridges, a Robins Air Force Base employee, said they decided to vote not guilty before deliberations began.

"Although they couldn't be specific, it was some time within a day or two before the case went to the jury when they formed an opinion."

Appellee is the Betty Elliott named in the article, and after demanding and failing to receive a retraction she commenced this action under Code Ann. § 105-703 (Ga. L. 1893, p. 131), alleging that the statements were not made by her and that they were false and maliciously defamatory. A jury returned a verdict for appellee of $50,000 actual and $150,000 punitive damages.

Held:

1. Code Ann. § 105-703, supra, provides: "Any false and malicious defamation of another in any newspaper, magazine, or periodical, tending to injure the reputation of any individual and expose him to public hatred, contempt, or ridicule, shall constitute a newspaper libel, the publication of such libelous matter being essential to recovery."

Appellant asserts that the alleged statement is not defamatory as a matter of law.

Except where an alleged writing is not defamatory as a matter of law, the general rule is that the issue of defamation is a matter of fact to be determined by a jury. *Atlanta Journal Co. v. Doyal,* 82 Ga. App. 321 (3), 330 (60 SE2d 802).

Appellant cites *Garland v. State,* 211 Ga. 48 (84 SE2d 13) in support of its assertion. *Garland v. State* was a criminal defamation case in which it was held as a matter of law that the defendant's publication in a newspaper article concerning a murder conviction that the jury "did not even deliberate on the case — the verdict was already made," was not defamatory of the jury members. The court found that the words meant that the jury did not deliberate or consult with one another to form an opinion as to guilt or innocence and that their collective minds had arrived at a verdict of guilty when they reached the jury room.

The instant case is distingishable from *Garland v. State* as the writing is capable of the construction that the appellee had made up her mind to vote not guilty well before she entered deliberations.

While *Garland v. State* could find nothing defamatory in an article indicating that a juror without discussion could make up his mind as soon as he entered the deliberation room, it stated that it was improper for "a juror (to) make up his mind as to guilt or innocence . . . (before) all of the evidence has been submitted and the court has instructed on the law." Id at 50.

The parties stipulated that the article's statement that "a day or two before the case went to the jury" was a time when the prosecution had rested. From this it is argued that the article therefore could not be defamatory as a matter of law because if the prosecution had not proved the case beyond a reasonable doubt, saying that a juror made up her mind after the prosecution rested does not charge the juror with any improper conduct as the juror has the right to have such an opinion at that point in the trial.

This argument does not recognize that in considering whether a writing is defamatory as a matter of law, we look not at the evidence of what the extrinsic circumstances were at the time indicated in the writing, but at what construction would be placed upon it by the average reader. *Southeastern Newspapers, Inc. v. Walker,* 76 Ga. App. 57, 60 (44 SE2d 697); *Atlanta Journal Co. v. Doyal,* 82 Ga. App. 321 (3), 330, supra; *Garland v. State,* 211 Ga. 44, 48 (84 SE2d 9).

Thus, in the instant case, since the article does not indicate that the prosecution had rested or that appellee had heard all of the state's evidence and found it insufficient to prove guilt, the average reader, not being aware of these matters from the article and not otherwise having the knowledge that the prosecution had rested at the time appellee allegedly decided to vote not guilty, could quite easily come to the understanding that appellee had not properly done her duty as a juror by deciding the case without hearing all of the evidence. In other words, the article is capable of having more than one meaning.

"[W]here words are capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, which of the two meanings will be attributed to it by those to whom it is addressed or by whom it is read. [Cit.]" *Reece v. Grissom,* 154 Ga. App. 194, 195 (267 SE2d 839).

Accordingly, taking the plain meaning of the language of the article as would an average reader thereof, we cannot say as a matter of law that the article is not defamatory. *Horton v. Georgian Co.*, 175 Ga. 261 (3) (165 SE 443); *Abernathy v. News Publishing Co.*, 45 Ga. App. 693 (3) (165 SE 924); *Praireland &c. of Ga. v. Thompson*, 135 Ga. App. 73 (2) (217 SE2d 296).

2. There is no merit in appellant's contention that it is not liable for the punitive damages awarded because "actual malice" had not been proven.

Appellant's arguments based on constitutional law requiring separate evidence of a defendant's "actual malice" before a defamation can be found applies to defamations against public officials and public figures and are inapposite in this case as there is no evidence that appellee was a public figure or a public official.

"Code § 105-2002 provides as follows: 'In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.' . . . Malice is an aggravating circumstance, and upon proof thereof punitive damages may be awarded to deter the wrongdoer (but not for wounded feelings under Code § 105-2002), and this is true even though the measure of damages is limited only by the enlightened conscience of impartial jurors, as provided by Code § 105-2003. [Cits.] Our Code, § 105-706, provides as follows: 'In all actions for printed or spoken defamation, malice is inferred from the character of the charge. The existence of malice may be rebutted by proof, which shall in all cases go in mitigation of damages, and in cases of privileged communications it shall be in bar of the recovery.'" *Atlanta Journal Co. v. Doyal*, 82 Ga. App. 321 (4), 332, supra.

"As to proof of malice, proof that the writing is false, and that it maligns the private character or mercantile standing of another, is itself evidence of malice. [Cits.] . . .

"Publication of a false statement which tends to injure the reputation of another and expose him to public hatred, contempt or ridicule, will be presumed to be a malicious publication; the burden is on the publisher to rebut this presumption. [Cit.]" *Montgomery v. Pacific & Sou. Co.*, 131 Ga. App. 712, 717 (206 SE2d 631).

Thus, in the instant case, where appellee was neither a public figure nor a public official and there was no evidence that the defense of privilege was applicable, malice was inferrable from the nature and circumstances of the alleged defamation. Although appellant presented evidence that it did not act maliciously, it was apparently not sufficient to rebut the inference of malice. We find the evidence sufficient to authorize the jury to find the existence of a false and malicious defamation. That being so, the malice was also an aggravating circumstance authorizing the imposition of punitive damages under Code Ann. § 105-2002 to deter the wrongdoer. *Atlanta Journal Co. v. Doyal*, 82 Ga. App. 321 (4), 333, supra.

3. It is contended that the awards of actual and punitive damages were excessive.

" ' "When a case comes before this court, after the refusal of a new trial by the presiding judge, it comes not only with the presumption in favor of the verdict, but also stamped with the approval of the judge who tried the case, and where no prejudice or bias or corrupt means in reaching the verdict appear, we are not authorized to set it aside as being excessive. [Cits.]" ' [Cit.] 'This court does not have the broad discretionary powers invested in trial courts to set aside verdicts, and where the trial court before whom the witnesses appeared had the opportunity of personally observing the witneses, including the plaintiff on the stand, has approved the verdict, this court is without power to interfere unless it is clear from the record that the verdict of the jury was prejudiced or biased or was procured by corrupt means. [Cit.]' [Cit.]" *Melton v. Bow*, 145 Ga. App. 272 (4), 274-5 (243 SE2d 590).

In the absence of any showing of prejudice or bias or corrupt means in reaching the verdict or any abuse of the trial court's discretion in refusing to overturn the verdict, we cannot say that the awards of actual and punitive damages were excessive as a matter of law.

4. Error is enumerated because three witnesses for appellee were permitted, over objection, to testify as to what the alleged defamatory language meant to them.

Libel is either per se or per quod. Defamatory words which are actionable per se are those which are recognized as injurious on their face — without the aid of extrinsic proof. However, if the defamatory character of the words do not appear on their face but only become defamatory by the aid of extrinsic facts, they are not defamatory per se, but per quod, and are said to require innuendo. See generally 53 CJS 42-43, Libel and Slander § 8. "The office of an innuendo is to explain that which is of doubtful or ambiguous meaning in the language of the publication, but cannot enlarge the meaning of words plainly expressed therein." *Park & Iverson v. Piedmont &c. Life Ins. Co.*, 51 Ga. 510 (1). Where the words used are capable of having two or more different meanings, they are ambiguous and the plaintiff may allege the meaning with which he claims they were published, and it is for the jury to determine whether they were so published. *Blackstock v. Fisher,* 95 Ga. App. 117, 121 (97 SE2d 322). The testimony of readers of the alleged defamatory language as to what they understood the words to mean may be admitted where the meaning is doubtful or ambiguous. 53 CJS 311, Libel and Slander § 201b. Compare, *Kaplan v. Edmondson,* 68 Ga. App. 151 (1) (22 SE2d 343). See, 3 Restatement of Torts(2d) 164, § 563e.

The language of the article in the instant case was not libelous per se and the trial court correctly did not charge the jury to that effect. As we have heretofore indicated, where the alleged language is not ruled defamatory or not defamatory as a matter of law, such language means what

the average reader construes it to mean. That being so, the testimony of witnesses as to what the language means to them is relevant and admissible evidence on the issue of the meaning of ambiguous language. *Reece v. Grissom,* 154 Ga. App. 194, supra, cited by appellant, is inapposite as the alleged language therein was held to be not defamatory as a matter of law.

5. The trial court did not err in giving appellee's third and fourth requests to charge. As indicated above, the alleged language was not libelous per se and was capable of more than one meaning. The contentions of the parties and the evidence clearly show this. Therefore, the challenged charges were properly adjusted to the evidence.

6. Appellant's fourth request to charge was amply covered by the charge given which defined newspaper libel in the language of Code Ann. § 105-703, supra.

7. The remaining allegations of error are either resolved by the foregoing findings or are not meritorious.

Judgment affirmed. Shulman, C. J., and Carley, J., concur.

APPENDIX C

Court of Appeals of the State of Georgia

ATLANTA, February 8, 1983

The Honorable Court of Appeals met pursuant to adjournment.

The following judgment was rendered:

65201.

THE MACON TELEGRAPH PUBLISHING CO.

v.

BETTY H. ELLIOTT (25097)

This case came before this court on appeal from the State Court of Bibb County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Shulman, P.J., Quillian, C.J., Carley, J., concur.

BILL OF COSTS, $30.00

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, NOV 10 1983

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia, and that Ed S. Sell, III paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

ALTON HAWK
Clerk.

In The

State Court of Bibb County

Case No. 25097

ORDER ON REMITTITUR

BETTY H. ELLIOTT

vs.

THE MACON TELEGRAPH PUBLISHING COMPANY

IT IS ORDERED that the judgment of the Court of Appeals of Georgia affirming the judgment of the State Court of Bibb County in the foregoing case be made the judgment of the State Court of Bibb County.

This 14th day of November, 1983.

J. TAYLOR PHILLIPS

Judge, State Court of Bibb County

APPENDIX D

Court of Appeals of the State of Georgia

ATLANTA, March 10, 1983

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

65201.

THE MACON TELEGRAPH PUBLISHING CO.

v.

BETTY H. ELLIOTT.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

NOTE: Revised pp. 6 thru 13 to replace previous pp. 6 thru 12 in original opinion. (Div. 2 rewritten and Div. 3 added). New pages 6 thru 13 attached.

[CERTIFICATION OMITTED IN PRINTING]

65201. THE MACON TELEGRAPH PUBLISHING COMPANY

v.

ELLIOTT

QUILLIAN, Presiding Judge.

This is an appeal from a verdict and judgment for plaintiff-appellee Elliott in an action against defendant-appellant publishing company for libel.

Appellee was a juror in the 12 day retrial of a murder case in which the defendant was acquitted, the first trial having resulted in a mistrial. Three days after the trial concluded, a reporter for appellant spoke to appellee on the telephone and questioned her about the trial. As a result the following appeared in an article about the trial published in appellant's newspaper:

"Two other members of the jury that acquitted Lumpkin of murder Friday disclosed in post-trial interviews that they had already made up their minds before the panel met collectively to discuss the case . . .

"Betty Elliott, a bus driver for the Bibb County Board of Education, and Louie A. Bridges, a Robins Air Force Base employee, said they decided to vote not guilty before deliberations began.

"Although they couldn't be specific, it was some time within a day or two before the case went to the jury when they formed an opinion."

Appellee is the Betty Elliott named in the article, and after demanding and failing to receive a retraction she commenced this action under Code Ann. § 105-703 (Ga. L. 1893, p. 131), alleging that the statements were not made by her and that they were false and maliciously defamatory. A jury returned a verdict for appellee of $50,000 actual and $150,000 punitive damages.

Held:

1. Code Ann. § 105-703, supra, provides: "Any false and malicious defamation of another in any newspaper, magazine, or periodical, tending to injure the reputation of any individual and expose him to public hatred, contempt, or ridicule, shall constitute a newspaper libel, the publication of such libelous matter being essential to recovery."

Appellant asserts that the alleged statement is not defamatory as a matter of law.

Except where an alleged writing is not defamatory as a matter of law, the general rule is that the issue of defamation is a matter of fact to be determined by a jury. *Atlanta Journal Co. v. Doyal,* 82 Ga. App. 321 (3), 330 (60 SE2d 802).

Appellant cites *Garland v. State,* 211 Ga. 48 (84 SE2d 13) in support of its assertion. *Garland v. State* was a criminal defamation case in which it was held as a matter of law that the defendant's publication in a newspaper article concerning a murder conviction that the jury "did not even deliberate on the case — the verdict was already made," was not defamatory of the jury members. The court found that the words meant that the jury did not deliberate or consult with one another to form an opinion as to guilt or innocence and that their collective minds had arrived at a verdict of guilty when they reached the jury room.

The instant case is distinguishable from *Garland v. State* as the writing is capable of the construction that the appellee had made up her mind to vote not guilty well before she entered deliberations.

While *Garland v. State* could find nothing defamatory in an article indicating that a juror without discussion could make up his mind as soon as he entered the deliberation room, it stated that it was improper for "a juror (to) make up his mind as to guilt or innocence . . . (before) all of the evidence has been submitted and the court has instructed on the law." Id at 50.

The parties stipulated that the article's statement that "a day or two before the case went to the jury" was a time when the prosecution had rested. From this it is argued that the article therefore could not be defamatory as a matter of law because if the prosecution had not proved the case beyond a reasonable doubt, saying that a juror made up her mind after the prosecution rested does not charge the juror with any improper conduct as the juror has the right to have such an opinion at that point in the trial.

This argument does not recognize that in considering whether a writing is defamatory as a matter of law, we look not at the evidence of what the extrinsic circumstances were at the time indicated in the writing, but at what construction would be placed upon it by the average reader. *Southeastern Newspapers, Inc. v. Walker,* 76 Ga. App. 57, 60 (44 SE2d 697); *Atlanta Journal Co. v. Doyal,* 82 Ga. App. 321 (3), 330, supra; *Garland v. State,* 211 Ga. 44, 48 (84 SE2d 9).

Thus, in the instant case, since the article does not indicate that the prosecution had rested or that appellee had heard all of the state's evidence and found it insufficient to prove guilt, the average reader, not being aware of these matters from the article and not otherwise having the knowledge that the prosecution had rested at the time appellee allegedly decided to vote not guilty, could quite easily come to the understanding that appellee had not properly done her duty as a juror by deciding the case without hearing all of the evidence. In other words, the article is capable of having more than one meaning.

"[W]here words are capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, which of the two meanings will be attributed to it by those to whom it is addressed or by whom it is read. [Cit.]" *Reece v. Grissom,* 154 Ga. App. 194, 195 (267 SE2d 839).

Accordingly, taking the plain meaning of the language of the article as would an average reader thereof, we cannot say as a matter of law that the article is not defamatory. *Horton v. Georgia Co.*, 175 Ga. 261 (3) (165 SE2d 443); *Abernathy v. News Publishing Co.*, 45 Ga. App. 693 (3) (165 SE2d 924); *Praireland &c. of Ga. v. Thompson*, 135 Ga. App. 73 (2) (217SE2d 296).

2. Appellant claims the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict on the issue of its liability for punitive damages.

Gertz v. Welch, 418 U. S. 323, 347-50 (94 SC 2997, 41 LE2d 789) held that while a private (as opposed to a public figure or public official) defamation plaintiff may recover actual damages without a showing of actual malice, such a private plaintiff cannot recover punitive damages without a showing of actual malice on the part of the defendant; that is, "with knowledge that (the defamation) was false or with reckles disregard of whether it was false or not." New York Times v. Sullivan, 376 U. S. 254, 279 (84 SC 710, 11 LE2d 686). This holding was recognized in *Williams v. Trust Co. of Ga.*, 140 Ga. App. 49 (1), 52 (230 SE2d 45).

Appellant argues that there is no evidence that its reporter had knowledge that what he wrote was false or that he wrote the story with reckless disregard for the truth. This is based on the reporter's testimony that what he wrote and was published was what appellee had told him; that is, that it was true.

On the other hand appellee maintains that based on her testimony that the article was false because she did not tell the reporter the things he published, the actual malice requirement for punitive damages was met as a fictional story meets the actual malice requirement; that is, that the reporter knew it was false when the article was published.

Thus, there was conflicting testimony on the issue of whether the publication was made with knowledge of its falsity. Where evidence is in conflict on an issue and does

not demand a verdict, it is error to direct a verdict thereon. OCGA 9-11-50 (a) (Code Ann. § 81A-150 (a)). From our review of the evidence and the trial court's charge on this issue, we find that the jury could reasonably conclude that the reporter, and thus appellant, was aware that the statements attributed to appellee were false when they were published and established actual malice.

We find no merit in appellant's contention that even if the reporter had knowledge of falsity it could not be imputed to appellant, as the rule in Georgia in libel is that the malicious conduct of an employee is imputed to the employer provided it is within the scope of his authority. *Atlanta Journal Co. v. Doyal,* 82 Ga. App. 321, 335, supra. Accord, *Garren v. Southland Corp.,* 237 Ga. 484, 485 (228 SE2d 870).

Therefore the trial court did not err in denying appellant's motion for directed verdict and judgment notwithstanding the verdict.

3. The trial court did not err in denying appellant's motion for a new trial made on the general grounds contending that there was no evidence that it libelled appellee or that appellee was entitled to punitive damages. "We have reviewed the record and find that the verdict was authorized by the evidence. [Cits.] The evidence presented questions for the jury which were resolved in favor of the (prevailing party). [Cit.] The evidence did not demand a verdict (for the losing party) and the jury was authorized by the evidence to reach a finding (for the prevailing party). [Cit.] The jury verdict had the approval of the trial judge, and after verdict the evidence is to be construed in the light most favorable to the prevailing party and every presumption and inference is in favor of sustaining the verdict. [Cit.] And, if there is any evidence to sustain the verdict of the jury, an appellate court will not disturb it. [Cit.]" ***Suber v. Fountain,*** 151 Ga. App. 283 (1), 285 (259 SE2d 685).

4. It is contended that the awards of actual and punitive damages were excessive.

" ' "When a case comes before this court, after the refusal of a new trial by the presiding judge, it comes not only with the presumption in favor of the verdict, but also stamped with the approval of the judge who tried the case, and where no prejudice or bias or corrupt means in reaching the verdict appear, we are not authorized to set it aside as being excessive [Cits.]" ' [Cit.] 'This court does not have the broad discretionary powers invested in trial courts to set aside verdicts, and where the trial court before whom the witnesses appeared had the oportunity of personally observing the witnesses, including the plaintiff on the stand, has approved the verdict, this court is without power to interfere unless it is clear from the record that the verdict of the jury was prejudiced or biased or was procured by corrupt means. [Cit.]' [Cit.]" *Melton v. Bow*, 145 Ga. App. 272 (4), 274-5 (243 SE2d 590).

In the absence of any showing of prejudice or bias or corrupt means in reaching the verdict or any abuse of the trial court's discretion in refusing to overturn the verdict, we cannot say that the awards of actual and punitive damages were excessive as a matter of law.

5. Error is enumerated because three witnesses for appellee were permitted, over objection, to testify as to what the alleged defamatory language meant to them.

Libel is either per se or per quod. Defamatory words which are actionable per se are those which are recognized as injurious on their face — without the aid of extrinsic proof. However, if the defamatory character of the words do not appear on their face but only become defamatory by the aid of extrinsic facts, they are not defamatory per se, but per quod, and are said to require innuendo. See generally 53 CJS 42-43, Libel and Slander § 8. "The office of an innuendo is to explain that which is of doubtful or ambiguous meaning in the language of the publication, but cannot enlarge the meaning of words plainly expressed therein." *Park & Iverson v. Piedmont &c. Life Ins. Co.*, 51 Ga. 510 (1). Where the words used are capable of having

two or more different meanings, they are ambiguous and the plaintiff may allege the meaning with which he claims they were published, and it is for the jury to determine whether they were so published. *Blackstock v. Fisher,* 95 Ga. App. 117, 121 (97 SE2d 322). The testimony of readers of the alleged defamatory language as to what they understood the words to mean may be admitted where the meaning is doubtful or ambiguous. 53 CJS 311, Libel and Slander § 201b. Compare, *Kaplan v. Edmondson,* 68 Ga. App. 151 (1) (22 SE2d 343). See, 3 Restatement of Torts (2d) 164, § 563e.

The language of the article in the instant case was not libelous per se and the trial court correctly did not charge the jury to that effect. As we have heretofore indicated, where the alleged language is not ruled defamatory or not defamatory as a matter of law, such language means what the average reader construes it to mean. That being so, the testimony of witnesses as to what the language means to them is relevant and admissible evidence on the issue of the meaning of ambiguous language. *Reece v. Grissom,* 154 Ga. App. 194, supra, cited by appellant, is inapposite as the alleged language therein was held to be not defamatory as a matter of law.

6. The trial court did not err in giving appellee's third and fourth requests to charge. As indicated above, the alleged language was not libelous per se and was capable of more than one meaning. The contentions of the parties and the evidence clearly show this. Therefore, the challenged charges were properly adjusted to the evidence.

7. Appellant's fourth request to charge was amply covered by the charge given which defined newspaper libel in the language of Code Ann. § 105-703, supra.

8. The remaining allegations of error are either resolved by the foregoing findings or are not meritorious.

Judgment affirmed. Shulman, C. J., and Carley, J., concur.

APPENDIX E

le

In The

Supreme Court of Georgia

Decided: OCT 4, 1983

39808.

THE MACON TELEGRAPH PUBLISHING COMPANY

v.

BETTY H. ELLIOTT.

PER CURIAM.

After plenary consideration of this matter, it is found not to satisfy the criteria for the grant of certiorari and the writ is therefore vacated.

Writ of certiorari vacated. Hill, C.J., Smith, J., Bell, J., and Judge Jere F. White concur; Marshall, P.J., Clarke, J., and Weltner, J., dissent; Gregory, J., disqualified.

APPENDIX F

(Appendix F)

Clerk's Office, Supreme Court of Georgia

ATLANTA 10/25/83

The motion for a rehearing was denied today:

Case No. 39808, The Macon Telegraph Publ. Co. v. Elliott

Hill, C.J., Smith & Bell, JJ., and Judge White concur. Marshall, PJ, Clarke & Weltner, JJ., dissent. Gregory, J., disqualified.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX G

Court of Appeals of the State of Georgia

ATLANTA, December 21, 1983

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

65201.

MACON TELEGRAPH PUBLISHING COMPANY

v.

BETTY H. ELLIOTT

Upon motion to recall remittitur and to grant stay filed by the Appellant in the above style case, it is ordered that the same be, and is hereby denied.

[CERTIFICATION OMITTED IN PRINTING]

Court of Appeals of the State of Georgia

Clerk's Office

Atlanta, December 21, 1983

I hereby certify that the foregoing page attached hereto contain true and complete copy of an order in case 65201. MACON TELEGRAPH PUBLISHING COMPANY v. BETTY H. ELLIOTT of the Court of Appeals of Georgia in the case therein stated, as appears from the original of file in this office.

Witness my signature and the seal of said Court hereto affixed the day and year above written.

ALTON HAWK
Clerk.